Supreme Court, U.S.
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No. 03-981

In The Supreme Court of the United States

BRIAN MCKEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should Brian McKee's statements to law enforcement officers have been suppressed due to the fact that they were the product of improper coercion applied or inducements offered by the Government's agents?

2. Did the court commit error in its application of the Federal Sentencing Guidelines on the assessment of the offense level, acceptance of responsibility, amount of damage attributable to the victim and the use of sophisticated means by the Petitioner?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE

Proceedings Below 5

Statement of Facts 6

REASONS FOR GRANTING THE WRIT

I. BRIAN MCKEE'S ADMISSIONS TO LAW ENFORCEMENT SHOULD HAVE BEEN SUPPRESSED BECAUSE THEY WERE THE PRODUCT OF IMPROPER COERCION APPLIED AND INDUCEMENTS OFFERED BY THE AGENTS 10

TABLE OF CONTENTS (CONT'D)

Page

II. THE DISTRICT COURT ERRED IN THE SENTENCING OF BRIAN MCKEE ON THE ASSESSMENT OF THE OFFENSE LEVEL, ACCEPTANCE OF RESPONSIBILITY, AMOUNT OF LOSS ATTRIBUTABLE TO HIM, AND USE OF SOPHISTICATED MEANS 15

CONCLUSION 19

APPENDIX A-1

TABLE OF AUTHORITIES

Cases **Page**

Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989) 11

Leon v. Wainwright, 734 F.2d 770 (11th Cir. 1984) 11

Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), *opinion modified on denial of reh'g*, 781 F.2d 185 (11th Cir.), *cert. denied*, 479 U.S. 909 (1986) 10

Miranda v. Arizona, 384 U.S. 436 (1966) 10

Oregon v. Elstad, 470 U.S. 298 (1985) 11

Rogers v. Richmond, 365 U.S. 534 (1961) 12

Streetman v. Lynaugh, 812 F.2d 950 (5th Cir. 1987) 12

United States v. Beale, 921 F.2d 1412 (11th Cir. 1991) 13

United States v. Beasley, 2 F.3d 1551 (11th Cir. 1993) 16

United States v. Bolin, 514 F.2d 554 (7th Cir. 1975) 12

United States v. Charles, 738 F.2d 686 (5th Cir. 1984) ... 11, 13

United States v. Finch, 998 F.2d 349 (6th Cir. 1993) 12

United States v. Lawrence, 47 F.3d 1559 (11th Cir. 1995) 16

United States v. Menesses, 962 F.2d 420 (5th Cir. 1992) 11

United States v. Raddatz, 447 U.S. 667 (1980) 14

TABLE OF AUTHORITIES (CONT'D)

Cases **Page**

United States v. Rogers, 906 F.2d 189 (5th Cir. 1990) 11

United States v. Tatum, 138 F.3d 1344 (11th Cir. 1998) 15

United States v. Williamson, 339 F.3d 1295 (11th Cir. 2003), *rehearing and rehearing en banc denied*, No. 02-12765 (11th Cir. Oct. 3, 2003) 1

Statutes

18 U.S.C. § 371 5

18 U.S.C. § 1341 5

18 U.S.C. § 1956 5

28 U.S.C. § 636 14

28 U.S.C. § 1254 1

U.S.S.G. § 1B1.3 (2001) 17

U.S.S.G. § 2B1.1 (2001) 16, 18

U.S.S.G. § 3E1.1 (2002) 17

U.S. Const. amend V 2, 10, 12

OPINIONS AND ORDERS BELOW

The Opinion of the Eleventh Circuit Court of Appeals is reported at *United States v. Williamson*, 339 F.3d 1295 (11th Cir. 2003), *rehearing and rehearing en banc denied*, No. 02-12765 (11th Cir. Oct. 3, 2003), and is set forth in the Appendix at A-1. The Court of Appeals Order denying rehearing is set forth in the Appendix at A-29. The Order of the Court of Appeals Granting the Stay of the Mandate to File a Petition for Writ of Certiorari, dated October 21, 2003, is set forth in the Appendix at A-31. The Judgment Order of the District Court is set forth in the Appendix at A-33.

STATEMENT OF JURISDICTION

On July 30, 2003, the United States Court of Appeals for the Eleventh Circuit issued an Opinion affirming the convictions of the Petitioner, Brian McKee, and the 94-month sentences imposed by the United States District Court for the Middle District of Alabama as a result of said convictions.

The Petitioner's application for rehearing and rehearing en banc were denied by the court on October 3, 2003 and on October 21, 2003, the Court of Appeals entered an Order staying their mandate to allow the Petitioner to proceed with his Petition for Writ of Certiorari to this Honorable Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), which provides in part the "cases in the Court of Appeals may be reviewed by the Supreme Court by Petition for Writ of Certiorari."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any person . . . be deprived of life, liberty, or property without due process of law[.]

U.S.S.G. § 1B1.3 (2001) provides:

> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (I) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> > (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
> >
> > (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for

that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

U.S.S.G. § 2B1.1(b) (2001) provides in pertinent part:

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (Apply the Greatest)		Increase in Level
(A)	$5,000 or less	no increase
(B)	More than $5,000	add 2
(C)	More than $10,000	add 4
(D)	More than $30,000	add 6
(E)	More than $70,000	add 8
(F)	More than $120,000	add 10
(G)	More than $200,000	add 12
(H)	More than $400,000	add 14
(I)	More than $1,000,000	add 16
(J)	More than $2,500,000	add 18
(K)	More than $7,000,000	add 20
(L)	More than $20,000,000	add 22
(M)	More than $50,000,000	add 24
(N)	More than $100,000,000	add 26.

. . . .

(8) If . . . (C) the offense otherwise involved sophisticated means, increase by 2 levels.

U.S.S.G. § 3E1.1 (2002) provides:

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has

assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

> (1) timely providing complete information to the Government concerning his own involvement in the offense; or
>
> (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense level by 1 additional level.

STATEMENT OF THE CASE

Proceedings Below

The Government charged Brian McKee and three other codefendants with a 31-count indictment alleging conspiracy to commit mail fraud in violation 18 U.S.C. § 371, mail fraud (Counts 2-18) in violation of 18 U.S.C. § 1341, conspiracy to commit money laundering (Count 19) in violation of 18 U.S.C. § 1956(h), and money laundering (Counts 20-31) in violation of 18 U.S.C. § 1956(a)(1)(A)(I). (R. 4-1-1.)

All appellants proceeded to trial in a joint trial. On January 22, 2002, Brian McKee, Dwight Faulk, and Linda Williamson were found guilty on all counts. (R. 4-261-1.) Jennifer McKee was found guilty only of conspiracy to commit mail fraud as set out in Count 1.

On May 3, 2002, the district court sentenced Brian

McKee to 94-months imprisonment (60 months on Counts 1 through 18; 94 months on Counts 19 through 31), with all sentences to run concurrently, followed by a 3-year term of supervised release. (R. 5-331-1; R. 28-241 through -245.) Notice of appeal was timely filed in this cause on May 13, 2002.

An appeal was taken to the United States Court of Appeals for the Eleventh Circuit on May 13, 2002, and a split decision was rendered by the court denying McKee's request for relief on July 30, 2003. (A-1.) The Petitioner's application for rehearing and rehearing en banc were denied by the Court of Appeals on October 3, 2003 (A-29), and this Petition for Writ of Certiorari followed. Brian McKee *has not* been incarcerated during the pendency of said appeals.

Statement of Facts

In 1995, the Etowah Solid Waste Disposal Authority ("ESWDA") was near bankruptcy. Its Board was seeking additional customers for its inert landfill. Big Wheel Recycling, Inc. ("BWRI") was dumping construction materials from four Marshall County mobile home builders in an inert landfill in Marshall County at $12.50 per ton. To induce BWRI to come to its landfill, ESWDA's Board passed a resolution authorizing a reduced one-half rate for a customer who was a recycler and had an office in Etowah County. (R. 32, Ex. 32-115.) BWRI was not named, but the resolution was designed to bring in BWRI. The resolution did not state if the reduced rate was one-half the $25 per ton commercial rate or one-half the $17.50 per ton municipal rate. Brian McKee, on instruction from the board chairman, gave BWRI an $8.75 per ton rate, or one-half of the $17.50 municipal rate. That action and getting BWRI as a customer saved ESWDA from bankruptcy. A second resolution was passed on August 12, 1997, for the reduced rate to be one-half of the municipal rate. (R. 23-B,

McKee Ex. 2-102.)

BWRI was a recycler and had an office in Etowah County. The Government claimed it was a "sham" office. It claimed that Jennifer McKee, Brian McKee's wife, who was paid by BWRI as its secretary in Etowah County and had the BWRI office in her home, had little to do. From 1995 to 2000, Jennifer McKee was paid $69,291.66 for her employment and for the use of her home. The amount paid each year averaged $13,855.50, as charged in the indictment. The Government claimed that the transferred funds were paid for the reduced rate to BWRI and constituted a fraud.

The proceeds paid to Jennifer McKee were not hidden and were not used by her or Brian McKee to promote any additional criminal conduct. The McKees made no effort to disguise the source from which the monies were received. The money was used by the McKees for family needs. The records of ESWDA showed the discounts given. All invoices sent to BWRI showed the discounts. (R. 16-199.) Barbara Abel, the chief clerk of the ESWDA, testified that everyone knew that the rate from which the discount was given was $17.50 per ton; that she applied the 50% discount to the tonnage; that way she knew where the trash came from and that it came on a BWRI truck. (R. 16-248, -249.) BWRI paid for all the mobile home construction waste deposited at the landfill. Payments came to ESWDA from BWRI and were proportioned out among the tonnage of Palm Harbor, Autumn Homes, Homes of Legend, and others. Everyone knew that BWRI was getting the reduced rate. (R. 18-155 through -170.) Everyone knew that the mobile home accounts were BWRI accounts. (R. 16-251, -256.) Nothing was hidden. A 1099 was given to Jennifer McKee from BWRI for the money paid during that year. The McKees reported and paid federal income taxes on it. No facts were offered or proved that McKee concealed or disguised the nature, location, source, ownership, or the control of the proceeds for any specific

unlawful activity. It was a receipt and use of the alleged illegally obtained funds.

On February 16, 2000, FBI agents came to McKee's home between 8:00 and 8:30 p.m. They wanted information from him to "get Judge Faulk," a codefendant, the owner of BWRI. (R. 13-91, -92, -93.) McKee received no *Miranda* warnings and it was his belief that what he said could not be used against him. He voluntarily talked with the FBI for two hours.

The agents came back to his home the next morning and talked with his wife, Jennifer McKee. (R. 13-94.) They did not say that she was the subject of any prosecution. There were no *Miranda* warnings. (R. 13-95, -96.)

Approximately ten days later, Brian McKee went to Montgomery at the request of the FBI and talked with FBI Agent Keith Baker and other enforcement officers at the State Attorney General's office. (R. 13-97.) The federal and state officials told him that they would let him off if he would help get Judge Faulk. (R. 13-97.) He was told that if he did not tell them something to get Judge Faulk, they were going to indict him and his wife. (R. 13-119.) The Government promised and gave an inducement, that they would not indict his wife, if he told them that he was paid by BWRI to give Faulk a reduced rate of $8.75 per ton and that he knew what he was doing was illegal. (R. 13-123; *see also* record excerpt 18 for testimony of suppression hearing.)

Brian McKee voluntarily went to Montgomery a second time for further interview. The United States Attorney told him he was subject to criminal prosecution and at that time, he ended the interview. (R. 13-99, -102.) Brian McKee was told that they were going to indict his wife on 41 charges. He learned of their intent to prosecute his wife at the last

meeting after he had cooperated with them and relied on their promises. He was never given a *Miranda* warning. He was told that he was a small fish in a big pond and that they wanted the big fish. (R. 13-108.)

Prior to the trial, Brian McKee filed a motion to suppress his statements. (*See* record excerpts 5 and 6 for motion to suppress; R4-98, -106 through -108; *see* record excerpt 18 for suppression hearing testimony.) Brian McKee testified and claimed at the suppression hearing that his statement was a product of interrogation and was given at the insistence of the Government with the promise and inducement that if he made the above statement, then the Government would not charge or indict his wife. His testimony was not disputed by the Government. FBI Agent Keith Baker was present but did not testify. The Government offered no rebuttal evidence, and never disputed the promise and inducement claimed by McKee in exchange for his testimony and an admission of joint wrongdoing by Judge Faulk, BWRI, and Brian McKee. The United States Attorney even asked him if he were still ready to testify to what he had told them. (R. 13-120, -121.) Brian McKee never withdrew from his offer to testify in exchange for no indictment of Jennifer McKee. (R. 13-122.)

The Government induced McKee by promising not to prosecute Jennifer McKee in exchange for his criminal admission. (R. 13-91 through -126.) She was prosecuted and the motion to suppress was denied. (R. 4-206-1.)

During the course of the trial, FBI Agent Keith Baker, over the objection of all parties, was allowed to testify to a redacted statement that Brian McKee admitted to him that he gave BWRI the reduced $8.75 per ton rate and that he knew that what he was doing was illegal. (R. 22-147, -155; R. 22-7 through -33; *see also* record excerpt 20 (redacted statement).)

The Government claimed at trial that McKee fraudulently allowed BWRI an improperly reduced rate of $8.75 per ton. It claimed that Faulk and BWRI made $1,009,109.46 as a result of the fraud; that Brian McKee conspired with Faulk and BWRI to defraud ESWDA out of fees; and that Brian McKee was paid $69,291.66 through his wife, Jennifer McKee, for his share in the fraudulent scheme and conspiracy, that is, for improper reduction in the tonnage rate. The Government claimed ESWDA was owed $1,009,109.46, but in October 2000, the Board of ESWDA claimed BWRI owed the Authority only $162,000. BWRI claimed it owed $70,930.

During the course of the trial, Donna White, Attorney General's Office of the State of Alabama, over the objection of all parties, testified that Jennifer McKee was paid additional monies of $9,567.35 (R. 26-57) from a BWRI Water Account, which was over and above the amount charged in the indictment and had nothing to do with ESWDA. (R. 22-212, -229, -233, -235, -239.)

REASONS FOR GRANTING THE WRIT

I. BRIAN MCKEE'S ADMISSIONS TO LAW ENFORCEMENT SHOULD HAVE BEEN SUPPRESSED BECAUSE THEY WERE THE PRODUCT OF IMPROPER COERCION APPLIED AND INDUCEMENTS OFFERED BY THE AGENTS.

Even if the prophylactic rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), is not applicable to law enforcement efforts to obtain statements from suspects, the Due Process Clause of the Fifth Amendment prohibits the admission at criminal trials of incriminating statements that were not made voluntarily. *Martin v. Wainwright*, 770 F.2d 918, 924 (11th Cir. 1985), *opinion*

modified on denial of reh'g, 781 F.2d 185 (11th Cir.), *cert. denied*, 479 U.S. 909 (1986). Statements must be suppressed if obtained by techniques or methods offensive to due process or under circumstances in which the suspect had no opportunity to exercise a free and unconstrained will. *Oregon v. Elstad*, 470 U.S. 298, 304 (1985). In *Harris v. Dugger*, 874 F.2d 756, 761-62 (11th Cir. 1989) (citing *Leon v. Wainwright*, 734 F.2d 770, 772 (11th Cir. 1984)), this court wrote as follows:

> A confession is voluntary if, under the totality of the circumstances, it is the product of the defendant's free and rational choice. . . . This means that the confession must not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, or by the exertion of any improper influence.

Where evidence is introduced that would support a determination that a statement was not voluntary, the Government not only has the burden of producing evidence that the confession was voluntary, but also has the burden of persuasion on that issue by a preponderance of the evidence. *United States v. Charles*, 738 F.2d 686, 695-96 n.11 (5th Cir. 1984).

At the suppression hearing, Brian McKee testified, without contradiction, that when he was first interviewed in Montgomery by the FBI, he was told that if he told them everything he knew about Judge Faulk they would let him off and that if he did not tell them something they would indict McKee's wife. A confession which is induced by an assurance that there will be no prosecution is not voluntary. *United States v. Menesses*, 962 F.2d 420, 428 (5th Cir. 1992). In *United States v. Rogers*, 906 F.2d 189 (5th Cir. 1990), the court affirmed an order suppressing the defendant's statement which was made after he had been told by state agents that he would not be prosecuted if he gave them information about missing

firearms. Although the statement at issue was made to federal agents, the court stressed that the statements were about the same incident about which he spoke to the state agents. Because the federal interview was conducted under the auspices of the state, whose representatives had assured the defendant that he would not be prosecuted if he gave a statement, the statement was found not to be voluntary for purposes of the Fifth Amendment. *Id.* at 192. Brian McKee had been given the same assurance that was made in Rogers – that he would not be prosecuted if he confessed to wrongdoing. That sort of inducement vitiates any voluntariness and the resulting statement should have been suppressed.

Compounding the effect of this inducement was the implicit, if not explicit, threat made by the federal agents that if Brian McKee did not confess his wife would be indicted. Such threats against family members of a suspect are universally condemned and held to be improper coercion. In *United States v. Finch*, 998 F.2d 349 (6th Cir. 1993), the court held that a statement admitting knowledge of the presence and location of cocaine was given involuntarily where the police told the defendant that they might arrest family members. "Coercion may involve psychological threats as well as physical threats. . . . Specifically, threats to arrest members of a suspect's family may cause a confession to be involuntary." *Id.* at 356. Similarly, in *United States v. Bolin*, 514 F.2d 554, 560-61 (7th Cir. 1975), the court ruled that the defendant did not voluntarily consent to a search where he executed a consent form only after it had been impliedly threatened that his girl friend would be arrested if he did not execute the form.

Thus, police threats to an accused or his family render a resulting confession involuntary. *Streetman v. Lynaugh*, 812 F.2d 950, 957 (5th Cir. 1987); *see also Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961) (indicating that threat made to the defendant that his wife would be arrested if he did not confess

rendered the confession involuntary). The FBI employed precisely that kind of coercion in this case, threatening to indict Brian McKee's wife if he did not confess. Plainly, his statement was not the result of a free and unconstrained choice but was forced from him by the threat against his wife.

These facts should have resulted in suppression of the statement and the district court erred in failing to do so. Indeed, the district court's decision cannot be justified on the basis that it made some credibility determination which rejected Brian McKee's version of the events leading up to the statement. His testimony that federal agents both offered not to prosecute him and threatened to indict his wife was not contradicted by any evidence offered by the Government. McKee's testimony at the suppression hearing was certainly enough to support a determination that the statement was not voluntary, so the Government had the burden of producing evidence that the confession was voluntary and the ultimate burden of persuasion on that issue. *Charles*, 738 F.2d at 695-96 n.11. The Government wholly failed to satisfy its burden of production, much less persuasion. In *United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir. 1991), this court held that where a defendant's testimony that he signed a *Miranda* waiver only after agents told him that this would not hurt him, thereby misleading the defendant as to the consequences of the waiver, was unrebutted by the Government, the testimony had to be accepted. Since this testimony established that the waiver was not knowing and voluntary, the district court erred in denying the defendant's motion to suppress that statement. *Id.* at 1435. Brian McKee's testimony demonstrating improper inducements and coercion, which led to the making of the statements in question, also was not rebutted below, and since that testimony establishes that the statement was not given voluntarily, the district court erred in refusing to suppress the statement, and further the district court erred in not granting a de novo hearing on McKee's

timely objections to the order and recommendation of the magistrate judge's denial of the motion to suppress.

In this court's majority decision regarding Brian McKee it cited the case of *United States v. Raddatz*, 447 U.S. 667 (1980), in addressing the issue of the use of magistrate judges to conduct suppression hearings in criminal cases in the United States District Court. The majority totally misapplied the holding of that case in that this court made the determination that "an independent review of the file" was the same thing as a "de novo hearing" as defined in *Raddatz*. In this case at the time the district judge entered his order citing "an independent review of the file," the transcript of the suppression before the magistrate judge had not even been transcribed and therefore the district judge did not and could not have reviewed the testimony before the magistrate judge in making his ruling, it was simply a rubber stamp of approval which resulted in extreme prejudice to McKee and the other defendants at trial.

Contrary to *Raddatz*, in the case at hand there is no suggestion that the court even reviewed the testimony or transcript of the suppression hearing in making his determination. There is no suggestion of a "de novo determination" of the recommendation report issued by the magistrate judge to which very thorough objections had been made. The requirements of 28 U.S.C. § 636(b)(1)(c), were never met by the district court, in fact, his order proves this by citing "an independent review of the file" and not a "de novo determination." Further, the facts of the case at hand are not on point with the facts of *Raddatz* because most importantly there was never any response by the Government that would contradict the challenge made by McKee regarding the voluntariness of his statements, which clearly distinguishes the two cases in that *Raddatz* had conflicting testimony for the court to consider. In addition, at the suppression hearing the Government acknowledged that

promises and inducements were made and asked if McKee was prepared to follow through with his part of the bargain at that point. These two events and statements were more than enough evidence to shift the burden of showing that the statement was voluntary to the Government. The magistrate judge never required this of the Government and the district judge simply gave his rubber stamp approval to this violation and the Eleventh Circuit has followed suit and ignored the facts that exist in the record and existing case law.

II. THE DISTRICT COURT ERRED IN THE SENTENCING OF BRIAN MCKEE ON THE ASSESSMENT OF THE OFFENSE LEVEL, ACCEPTANCE OF RESPONSIBILITY, AMOUNT OF LOSS ATTRIBUTABLE TO HIM, AND USE OF SOPHISTICATED MEANS.

Brian McKee asserts that error was committed in the sentencing phase with regard to the assessment of (a) offense levels, (b) acceptance of responsibility, (c) amount of loss attributable to him, and (d) the application of loss to the victim as a basis when the same was speculative as set out in *United States v. Tatum*, 138 F.3d 1344 (11th Cir. 1998).

The district court assessed the amount of loss attributed to Brian McKee at $1,009,109.46. (R. 28-225.) That figure was speculative at best. (R. 28-127 through -142; *see* record excerpt 21 for proceeding.) It presupposed and speculated that the actual tonnage dumped at the ESWDA landfill would have been the same had the increased rate of $25.50 or $17.50 a ton been charged. The Government offered no evidence during the trial that Faulk, by and through BWRI, would have dumped the same tonnage at the landfill had the rate been $25.50 per ton or $17.50 per ton. Except for the

reduced rate of $8.75, it is ludicrous to say that he would have traveled a longer distance, at a greater expense, and paid a greater price per ton at ESWDA landfill than he could have by dumping it in a Marshall County landfill at the $12.50 per ton rate. Therefore, the district court had to speculate in order to arrive at the assessed amount.

The *specific offense characteristics* pursuant to U.S.S.G. § 2B1.1(b)(1) should have been based on $69,291.66 which represents the total amount of payments made to McKee through his wife by BWRI. There was no testimony that Brian McKee profited from the claimed scheme or loss in excess of $69,291.66. The only amount of money which was foreseeable for the benefit to McKee, was the money paid to his wife, Jennifer McKee.

For each defendant reasonable foreseeability does not follow automatically from proof that a defendant was a member of the conspiracy. At sentencing the trial court can not and should not have assumed that all acts of each participant in jointly undertaking criminal activity were reasonably foreseeable to everyone. The court should have found two different amounts: the amount of actual loss, not speculative loss, caused by the entire conspiracy, and the amount of loss reasonably foreseeable to Brian McKee which was the $69,291.66.

For the offense level the district court should have used the same rationalization utilized in determining the quantity of drugs attributable to a particular defendant in a conspiracy under the guidelines. In a drug case the court makes individualized findings concerning the scope of criminal activity undertaken by a particular defendant and then determines the quantities of drugs that are properly attributable to each defendant. *United States v. Lawrence*, 47 F.3d 1559 (11th Cir. 1995); *United States v. Beasley*, 2 F.3d 1551,

1561 (11th Cir. 1993). The cases indicate that the total amount of drugs were not attributable to all defendants. Likewise, the total amount of loss in a fraud case should not be attributable to every defendant in a conspiracy under a mail fraud case. There was error in basing the offense level on $1,009,109.46 for Brian McKee.

There was error in the application of *acceptance of responsibility*. McKee should have had a three-point reduction in the adjusted guidelines level for acceptance of responsibility and was entitled to a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1 based on the following:

After Brian McKee's resignation from the ESWDA on February 14, 2000, he gave three separate interviews to the Government regarding his dealings with the activities which resulted in these indictments. At all times he acknowledged his responsibility.

At trial FBI Agent Baker testified that Brian McKee stated to him "that he knew what he did was illegal." Brian McKee fully acknowledged his involvement in the offense, with counsel present, and accepted his responsibility for his actions and involvement.

In determining whether a defendant qualifies under U.S.S.G. § 3E1.1, considerations may include, but are not limited to the following: (1) truthfully admitting the conduct comprising the offenses and the conspiracy (McKee truthfully admitted and did not falsely deny any relevant conduct for which he was accountable under U.S.S.G. § 1B1.3, relevant conduct); (2) voluntary resignation from the office or position that he held during the commission of the offense (McKee resigned from ESWDA on February 14, 2000; the indictment was not returned until July 2001); and (3) the timeliness of conduct in manifesting the acceptance of responsibility (at the

first occasion in which Brian McKee was interviewed he acknowledged his responsibility and involvement). The interview occurred two months after Brian McKee's resignation, but some 14 months before the indictment. His admission helped lead to the indictments. A defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial.

McKee's pretrial statements were utilized by the Government as a vital element in order to secure the convictions. The Government should not be allowed to profit from the use of these admissions and statements and then argue at sentencing that the statements made by Brian McKee were not in fact his acceptance of responsibility.

The district court should have considered the evidence which was presented at all pretrial hearings, which went unchallenged by the Government, that Brian McKee did accept his responsibility. He should have been allowed a reduction for acceptance of responsibility and his adjusted guideline offense level should have been reduced by three levels.

The district court also erred in *increasing by two levels* pursuant to U.S.S.G. § 2B1.1(b)(8)(c) by finding that the offense involved "*sophisticated means*." This enhancement is predicated solely upon the adoption by the district court of the Government's argument that the BWRI located in Etowah County was solely a "sham office" and not a legitimate business operating in Etowah County, Alabama. The jury did not make that finding. It was not a "sham office."

BWRI trucks were kept, serviced, and dispatched in Etowah County; it obtained tags for its trucks, business licenses, and city business licenses in Etowah County; it had a telephone book listing in the yellow pages in the Gadsden,

Etowah County, Alabama, telephone directory; and it conducted newspaper recycling drives and fund-raisers for various entities throughout Etowah County.

There was no especially complex or intricate conduct on behalf of any defendants. The Government claimed there was an improper reduction in the cost per ton for the disposal of waste at ESWDA landfill which resulted in a loss to the Etowah County Solid Waste Disposal Authority.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Petitioner's Counsel of Record

No. _____

In The Supreme Court of the United States

BRIAN MCKEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX

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TABLE OF CONTENTS

Page

Opinion of the Court of Appeals, *United States v. Williamson*, 339 F.3d 1295 11th Cir. 2003) A-1

Order of the Court of Appeals Denying Rehearing A-29

Order of the Court of Appeals Granting a Stay of the Mandate to File a Petition for Writ of Certiorari A-31

Judgment Order of the District Court A-33

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LINDA WILLIAMSON, A.K.A. LINDA WEST,
DWIGHT FAULK, et al.,
Defendants-Appellants.

No. 02-12765.

United States Court of Appeals,
Eleventh Circuit.

July 30, 2003.

Defendants were convicted of conspiracy to commit mail fraud, mail fraud, conspiracy to commit money laundering, and money laundering by the United States District Court for the Middle District of Alabama, No. 01-00106-CR-N, Myron H. Thompson, J., and they appealed. The Court of Appeals held that: (1) evidence that administrator for solid waste disposal authority, knowing that company for which his wife worked was not recycling company, had conspired with company's principals, in return for kickbacks routed through his wife, to give company a discounted rate available only to recyclers for waste that it dumped at landfill, was sufficient to support mail fraud and conspiracy to commit mail fraud convictions; (2) evidence that defendants had deposited and cashed checks which represented the proceeds of their mail fraud conspiracy was sufficient to sustain conviction for promotional money laundering; and (3) post-arrest statement made by administrator, acknowledging that he had been paid for arranging for company to receive this special rate, did not facially implicate his alleged co-conspirators as parties making payments and did not violate co-conspirators' *Bruton*

confrontation rights.

Affirmed.

Dowd, District Judge, sitting by designation, concurred in part and dissented in part and filed opinion.

Gregory M. Biggs, Montgomery, AL, George L. Beck, Jr., Beck & Byrne, P.C., David B. Byrne, Jr., Capell & Howard, Montgomery, AL, John D. Floyd, Jack Floyd, Floyd, Floyd & Floyd, Gadsden, AL, for Defendants-Appellants.

Verne H. Speirs, Montgomery, AL, for Plaintiff-Appellee.

Appeals from the United States District Court for the Middle District of Alabama.

Before DUBINA and FAY, Circuit Judges, and DOWD,* District Judge.

PER CURIAM:

On June 27, 2001, a federal grand jury returned a thirty-one count indictment against Defendants-Appellants Dwight Faulk ("Faulk"), Linda Williamson ("Williamson"), and Brian and Jennifer McKee for conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 (Count 1), mail fraud in violation of 18 U.S.C. § 1341 (Counts 2-18), conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) (Count 19), and money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(I) (Counts 20-31). Following a joint jury trial, Faulk, Williamson and Brian McKee were found guilty on all

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*Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

charges. Jennifer McKee was found guilty for violation of 18 U.S.C. § 371, conspiracy to commit mail fraud. The Appellants timely appealed their convictions.

In this appeal, the Appellants challenge the sufficiency of the evidence against them, and challenge the District Court's admission of non-testifying codefendant Brian McKee's inculpatory statements to law enforcement personnel pursuant to *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).[1] After consideration of the parties' briefs and oral argument as well as an independent review of the entire record of trial, we conclude that there exists a sufficient legal basis for a reasonable jury to have convicted the Appellants, and that the district court did not err in admitting Brian McKee's statements.

I. BACKGROUND

The Etowah Solid Waste Disposal Authority ("ESWDA") was established by the Etowah County Commission in September 1993 for the purpose of operating an inert landfill in Etowah County, Alabama. The ESWDA consisted of a five-member Board of Directors tasked by the Etowah County Commission with the responsibility of overseeing the operation of the landfill.

Because the Etowah County landfill did not meet certain federal and state guidelines, it only accepted disposal

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[1]The Appellants raise a host of additional issues for our consideration. Based on a thorough review of the record and consideration of oral argument, we find those issues to be without merit and, therefore, affirm the district court without extended analysis.

of non-putrescible waste such as construction and demolition ("C&D") materials and other inert, non-hazardous items. Putrescible waste such as household garbage was diverted from the Etowah County landfill to an Etowah County transfer station where, at considerable expense to the ESWDA, it was hauled to an adjacent county for disposal in a landfill that met the pertinent guidelines.

As it turns out, the Etowah County landfill was an extremely profitable venture for the ESWDA. However, the ESWDA was losing significant revenue through the transfer station as a result of having to separate and haul putrescible waste. Accordingly, the ESWDA sought to reduce the amount of putrescible waste entering the transfer station and to maximize the non-putrescible waste entering the Etowah County landfill. To meet this objective, in March 1995, the ESWDA passed two resolutions drafted and presented by Brian McKee, the Solid Waste Administrator for the ESWDA. The first resolution provided for a fifty percent reduction in the dumping fee at the Etowah County landfill to recycling companies located in Etowah County.[2] The second resolution allowed commercial haulers to take advantage of the lower municipal rate provided that a minimum of 2,750 tons of waste were disposed of per month and that the hauler's account with the ESWDA was not past due. In August 1995,

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[2]At the time of the passage of the first resolution, commercial haulers of waste were required to pay a dumping fee of $20.00 per ton for use of the Etowah County landfill. The $20.00 per ton commercial dumping rate was in effect until September 1995, at which time the rate increased to $25.50 per ton. In addition to the commercial hauler rate, there existed a special municipal rate of $17.50 per ton. The municipal rate was also in effect at the time of the passage of the first resolution and at all times pertinent to this case.

Brian McKee introduced and the ESWDA passed a third resolution which altered the 2,570 tons per month requirement for a commercial hauler to receive the municipal dumping rate. The new dumping requirement for a commercial hauler to qualify for the municipal rate was 100 tons per day. Finally, in August 1997 a fourth resolution was passed by the ESWDA concerning the minimum required dumping amount enabling a commercial hauler to qualify for the municipal rate. The fourth resolution provided that a commercial hauler was entitled to receive the municipal rate if 500 tons of C&D waste were dumped.[3]

Seven days following the passage of the first two resolutions, Faulk, Probate Judge of Crenshaw County, Alabama and Williamson, County Administrator for Crenshaw County, Alabama formed a company called Big Wheel Recycling, Inc. (BWRI).[4] BWRI was formed by Faulk and Williamson in an attempt to take advantage of the discounted dumping rate available to commercial recycling companies located in Etowah County.[5] To this end, Faulk

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[3]The resolution did not specify the time period over which the minimum dumping requirement must be met in order to qualify for the municipal rate. However, witnesses testified and the Government all but conceded at trial that the 500 ton requirement was monthly.

[4]Williamson owned 998 of the outstanding 1000 shares of BWRI's stock and served as President of the corporation. Faulk was the Chief Executive Officer of BWRI and controlled the day-to-day activities of the corporation.

[5]The Government alleges that BWRI was formed as part of the conspiracy that existed between the Appellants wherein they sought to impermissibly receive discounted dumping rates at the Etowah County landfill through the

entered into contracts with four mobile home manufacturers located in Marshall County, Alabama to haul their C&D waste. Because of the discounted dumping rate at the Etowah County landfill, Faulk could offer the mobile home manufacturers significantly reduced hauling rates for their C&D waste and still earn a substantial profit for BWRI. In order to qualify for the discounted dumping rate, however, BWRI would have to meet certain criteria. Yet, as the Government alleges, BWRI knowing and fraudulently received an $8.75[6] per ton dumping rate despite not meeting the criteria as established through the various ESWDA resolutions.

II. DISCUSSION

A. Sufficiency of the Evidence

The Government contends that the Appellants engaged in an elaborate scheme to defraud the ESWDA through a pattern of mail fraud and money laundering in order to impermissibly take advantage of the $8.75 per ton discounted dumping rate available at the Etowah County landfill. Simply explained, the Government contends that Brian McKee directed employees of the ESWDA to give BWRI an $8.75 per ton dumping rate knowing that BWRI was not a recycling company located in Etowah County nor had met the minimum dumping requirements. As payoff for knowingly and impermissibly being given the $8.75 per ton dumping rate, according to the Government, BWRI would funnel profits earned from the four mobile home manufacturers back to Brian McKee through his wife Jennifer, an employee of BWRI

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assistance of Brian McKee.

[6]The $8.75 per ton rate is the result of a fifty percent discount from the municipal rate of $17.50.

who ran an office for BWRI out of her Etowah County home. In total, the Government contends that BWRI defrauded the ESWDA of approximately $1.4 million.

Appellants contend that there is insufficient evidence to sustain their convictions for mail fraud and conspiracy to commit mail fraud. Appellants' contention that there is insufficient evidence to sustain their convictions is an issue we decide *de novo*. *United States v. Miles*, 290 F.3d 1341, 1355 (11th Cir.2002). We review the evidence to determine whether "a reasonable jury, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the Government could find the defendants guilty as charged beyond a reasonable doubt." *United States v. Navarro-Ordas*, 770 F.2d 959, 966 (11th Cir.1985) (internal citations omitted). A jury's verdict will be affirmed if the court determines that a "jury was rationally able to find that every element of the charged crimes was established by the Government beyond a reasonable doubt." *See United States v. McCarrick*, 294 F.3d 1286, 1289-90 (11th Cir.2002).

1. Mail Fraud

The Government presented evidence that could lead a reasonable jury to conclude that the Appellants knowingly and willfully defrauded the ESWDA by receiving a discounted dumping rate of $8.75 per ton to which BWRI was not entitled. Whether BWRI was entitled to an $8.75 per ton dumping rate, at the most basic level and as was hotly litigated at trial, concerns whether BWRI was a recycling company located in Etowah County.[7]

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[7]Appellants concede that BWRI never met the minimum dumping requirements needed to qualify for the municipal rate. The evidence further demonstrates that BWRI's account with the ESWDA was not paid and

The Appellants argue that BWRI was a recycling company because it engaged in what they term "source separation" which, as described by the Appellants, entails providing the means for separation and segregation of putrescible waste from non-putrescible waste. Appellants presented evidence at trial from both experts and lay witnesses which they argue proves that BWRI was engaged in source separation and that source separation is part of the recycling process. On this point, the evidence at trial shows that BWRI provided large trash containers known as pans to the various mobile home manufacturers so that the putrescible waste of the manufacturers could be disposed of separately

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up-to-date. Appellants argue, however, that the first resolution is independent of the other resolutions and, although silent on this point, is intended to give a fifty percent discount from the municipal rate to those recycling companies located in Etowah County. In opposition, the Government argues that the first resolution simply grants a fifty percent reduction from whichever rate would ordinarily apply and that in order to qualify for the $8.75 per ton rate, BWRI would have to be a recycling company located in Etowah County that had an up-to-date account with the ESWDA and met the minimum per month dumping requirement. While we need not resolve this issue, suffice it to say, a reasonable jury, based on all the evidence, could conclude that absent meeting the minimum dumping requirements and having an up-to-date account with the ESWDA, at best, a commercial recycling company located in Etowah County would qualify for a fifty percent discount from the commercial rate rather than from the municipal rate. Furthermore, BWRI's repeated failure to meet such criteria despite receiving the $8.75 per ton dumping rate is circumstantial evidence of the Appellants' intent to defraud the ESWDA and provides further support for the jury's verdict.

from the non-putrescible waste. Thereafter, BWRI would pick up the pans of non-putrescible waste and haul them to the Etowah County landfill for dumping. The putrescible household garbage would also be picked up by BWRI, however, such waste was directed to a proper dump site. Thus, as Appellants argue, source separation is certainly the beginning of the recycling process.

The Government presented evidence at trial showing that outside of the limited cardboard recycling that occurred in 1995, BWRI did not act as a recycling company. The Government argued at trial and now argues on appeal that BWRI is, in reality, nothing more than a regular commercial hauler of waste. Evidence in support of this position shows that the non-putrescible waste removed from the mobile home manufacturer facilities was simply transported to and dumped at the Etowah County landfill where it was covered in dirt.[8] Thus, as the Government contends and as the evidence demonstrates, the non-putrescible waste hauled by BWRI was not part of the recycling process because it was not destined for a recycling facility nor was it being recycled by BWRI. We conclude, therefore, that although "source separation" may begin the recycling process in some instances, a reasonable jury could conclude that BWRI was not recycling because it simply transported the non-putrescible waste from the mobile home manufacturers to the Etowah County landfill to be dumped without hope of ever being recycled for further use.[9]

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[8]Walter Nichols, a defense recycling expert, even testified that simply hauling non-putrescible waste to be dumped with no further expectation of that waste being converted and put to use is not recycling. This conclusion was supported by the Government's recycling experts.

[9]The Government showed that on many occasions putrescible waste from the mobile home manufacturers was

In further support of their position, Appellants argue that the evidence presented at trial shows that upon dumping of the non-putrescible waste at the Etowah County landfill, BWRI employees would sift through the rubble and would remove useable items such as carpet, wood, salvageable appliances, and copper wire for both personal use and resale. We simply conclude that a reasonable jury could have concluded that such activity does not qualify BWRI as a recycling company. The evidence shows that such activity, if it occurred, was sporadic at best. Further, the credibility of the main BWRI employee engaged in this practice, Bill Faulk, was significantly undermined as the Government elicited from the witness that he would personally haul, dump, and look through four to five loads of waste per day weighing anywhere from four to six tons and, thereafter, would remove any salvageable items from the rubble and transport those items to his house for storage.[10]

Finally, the Government presented the testimony of Larry Nobel, a driver for BWRI, who indicated that BWRI was not engaged in any recycling. This testimony is consistent with statements Faulk himself made to law enforcement officials and introduced into evidence wherein he indicated

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not separated from the non- putrescible waste. Thus, on those occasions, BWRI was illegally dumping putrescible waste at the Etowah County landfill.

[10]To describe this testimony as incredulous would be an understatement. As one witness during the trial described, this practice, if it occurred, amounted to nothing more than "pilfering." We conclude that a reasonable jury could have determined that this practice does not constitute recycling.

that BWRI was not engaged in recycling activities.[11] Furthermore, statements from Brian McKee to law enforcement officials were introduced into evidence wherein he indicated that he knew what he was doing was illegal.[12] Thus, we conclude that a reasonable jury could conclude that BWRI was not a recycling company.[13] Therefore, we affirm Appellants' mail fraud convictions.[14]

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[11]Out of concern for a possible *Bruton* violation, the district court instructed the jury on two separate occasions that Faulk's statements were to be considered solely against him.

[12]Appellants Faulk, Williamson, and Jennifer McKee appeal the introduction of Brian McKee's statements to law enforcement as being admitted into evidence in violation of *Bruton*. The district court instructed the jury on two separate occasions that Brian McKee's statements were to be considered solely against him. As discussed below, we affirm the district court's admission of Brian McKee's statements into evidence.

[13]Because we conclude that a reasonable jury could conclude that BWRI was not a legitimate recycling company, we need not address in detail the evidence concerning whether BWRI was located within Etowah County. In summary, however, we conclude that a reasonable jury could conclude, as the Government argues, that BWRI's attempt to run an office out of Jennifer McKee's Etowah County house was a sham, was part of the conspiracy to defraud the ESWDA, and is further evidence of the Appellants' knowing and willful attempt to receive an $8.75 per ton dumping rate for which BWRI did not legitimately qualify.

[14]Unlike her codefendants, Jennifer McKee testified in her own defense. Thus, per our circuit precedent, the jury was free to disbelieve her and use her testimony as substantive

2. Money Laundering

Appellants Faulk, Williamson, and Brian McKee contend that the evidence is insufficient to sustain their convictions for money laundering and conspiracy to commit money laundering. To obtain a conviction on a substantive Section 1956(a)(1)(A)(I) promotional money laundering charge, the Government bears the burden of proving beyond a reasonable doubt that: (1) the defendant conducted or attempted to conduct a financial transaction; (2) the defendant knew the property involved in the transaction represented the proceeds of unlawful activity; (3) the property involved was in fact the proceeds of the specified unlawful activity; and (4) the defendant conducted the financial transaction "with the intent to promote the carrying on of [the] specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(I). We find that all of these required elements have been satisfied.[15]

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evidence proving her guilt. *See United States v. Cotton*, 770 F.2d 940, 945 (11th Cir.1985) ("When a defendant takes the stand in a criminal case . . . the jury is free to disbelieve him and reject his explanation as a complete fabrication."); *United States v. Goggin*, 853 F.2d 843 (11th Cir.1988) (same); *see also, United States v. Allison*, 908 F.2d 1531 (11th Cir.1990) ("The jury may view the defendant's false explanatory statement as substantive evidence proving guilt.").

[15]In their briefs, Appellants argue that the evidence is insufficient to constitute concealment and that the books and records of BWRI including all bank accounts were open, clean, and clear. However, concealment or an intent to conceal the nature or sources of the proceeds has no bearing in this case as it is not a required element of the offense for which Appellants were charged. Section 1956(a)(1) defines two separate money laundering offenses: those committed with the "intent to promote the carrying on of a specified unlawful activity," 18

The evidence amply demonstrates, as the Government contends, that bank deposits of proceeds of the fraudulent activity were made by Appellants and that such deposits were designed to convert the checks received from the mobile home manufacturers into cash in order to capitalize on the fraud perpetrated upon the ESWDA. Thus, the depositing and cashing of checks that represented the proceeds of the mail fraud promoted not only the Appellants' prior unlawful activity, but also their ongoing and future unlawful activity. Such evidence is sufficient to sustain a conviction for promotional money laundering. *See, e.g., United States v. Haun*, 90 F.3d 1096, 1100-01 (6th Cir.1996). Further, since the ultimate object of the conspiracy was to transfer the unearned dumping rate into cash, the financial transactions were in furtherance of the ongoing conspiracy offense and are sufficient to sustain Appellants' convictions. *See United States v. Carcione*, 272 F.3d 1297 (11th Cir.2001).

B. *Bruton*

Despite the efforts of defense counsel, Government counsel, and the district court, Faulk, Williamson, and Jennifer McKee contend that the admission of statements of Brian McKee, even in their redacted form, violate *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). At trial, the Government introduced through the testimony of

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U.S.C. § 1956(a)(1)(A)(I); and those committed with the intent "to conceal or disguise the nature, location, the source, the ownership, or the control of the proceeds of the specified unlawful activity," 18 U.S.C. § 1956(a)(1)(B)(I). While Count 19 alleges both money laundering offenses, at some point the Government appeared to abandon the concealment charge and focus exclusively on the promotional charge. Thus, in effect, Count 19 is in line with Counts 20-31 which allege only promotional money laundering.

Special Agent Keith Baker admissions of nontestifying codefendant Brian McKee wherein he indicated that "he was being paid because of his having gotten the recycling resolution passed and for giving Big Wheel the discounted rate of $8.75 a ton for dumping debris at the Etowah Solid Waste Disposal Authority." Faulk and Williamson argue that Brian McKee's statement facially implicates BWRI thus necessarily implicating them in violation of *Bruton*. Additionally, Special Agent Baker testified that Brian McKee stated that "money that came through Jennifer was his." Jennifer McKee argues that this facially implicates her in violation of *Bruton*. For the following reasons we disagree and affirm the district court.

The Supreme Court held in *Bruton* that post-arrest statements made by nontestifying codefendants that facially incriminate other defendants are inadmissible into evidence because such statements violate the other defendants' Sixth Amendment rights to confront and cross-examine adverse witnesses. The Supreme Court concluded that "where the powerfully incriminating extra-judicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial," limiting instructions by the court will not suffice to eliminate the prejudicial effect of the introduction of such statements. *Bruton*, 391 U.S. at 135-36, 88 S.Ct. 1620. In *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), however, the Supreme Court had occasion to consider whether the confession of a nontestifying codefendant admitted during a joint trial that had been redacted to omit the names of all codefendants violated the rule established in *Bruton*. In that instance, the Court refused to apply *Bruton* and concluded that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with the proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."

Richardson, 481 U.S. at 211, 107 S.Ct. 1702. The Court concluded that in such a situation, the confession is not so "powerfully incriminating" that a limiting instruction given by the district court could not effectively eliminate any prejudicial effect to the codefendants. *Id.* at 208, 107 S.Ct. 1702. The *Richardson* Court, however, "expressed no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n. 5, 107 S.Ct. 1702. That was an issue subsequently addressed by the Supreme Court in *Gray v. Maryland,* 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998).

In *Gray,* a confession written by a codefendant that explicitly referred to the defendant was redacted to eliminate any reference to the defendant. However, the defendant's name was replaced with the word "deleted" or was simply left as a blank space. *Gray,* 523 U.S. at 188, 118 S.Ct. 1151. When the Government's law enforcement witness read the codefendant's confession into evidence, he said "deleted" wherever the defendant's name had been redacted. The witness then testified that following the receipt of the codefendant's confession, he arrested the defendant. The Supreme Court concluded that the "obviously redacted confession" violated *Bruton* because it "pointed directly to the defendant." *Id.* at 194, 118 S.Ct. 1151. Thus, the Court concluded that the redacted confession "facially incriminated" the defendant and "involved inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Id.* In reaching this conclusion, the Court distinguished its decision in *Richardson* where the redacted confession "became incriminating 'only when linked with evidence introduced later at trial.' " *Id.* at 196, 118 S.Ct. 1151 (quoting *Richardson,* 481 U.S. at 208, 107 S.Ct. 1702).

We find that the *Bruton* question raised in this case is covered by *Richardson.* In *Richardson,* the Supreme Court clearly authorized the admission of a nontestifying

codefendant's confession where such confession omitted reference to the defendant and was coupled with a limiting instruction. We fail to see how the statement of Brian McKee implicates, directly or otherwise, Faulk or Williamson. Faulk's and Williamson's arguments to the contrary are unavailing. Brian McKee's statement reflects only that he was paid to pass the recycling resolution and give BWRI a discounted dumping rate. The statement, as quoted above, does not facially implicate Faulk or Williamson as was the case with the confession the Supreme Court addressed in *Bruton*, nor was the statement "obviously redacted" as was the case in *Gray*. The statement itself is silent as to who paid Brian McKee. Furthermore, even assuming that it is self-evident that BWRI was paying Brian McKee for passing the resolution and giving the discounted rate, naming BWRI does not facially implicate either Faulk or Williamson. In order to make that inferential link, additional, independent evidence is needed. Simply because the Government provided the jurors with the independent evidence needed to make that link does not create a *Bruton* violation.[16] What the Government accomplished in this case is what the Supreme Court specifically authorized in *Richardson*.

Brian McKee's statement concerning Jennifer McKee, however, does directly implicate her. However, Special Agent Baker's testimony on this point was a product of defense cross-examination wherein counsel for Faulk and Williamson

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[16]By our conclusion, we do not mean to suggest that Brian McKee's statement did not potentially inculpate Faulk or Williamson. Rather, consistent with the Supreme Court's decision in *Richardson*, we simply conclude that the jury could follow the court's limiting instructions and limit the use of such statements to the proper defendant.

asked Special Agent Baker:

> Q. Rather than claiming that Big Wheel paid him money, wasn't he really just saying that any money that Jennifer, his wife, got from Big Wheel, he claimed was his money? Isn't that basically the gist of what he was saying?
>
> A. He said money that came through Jennifer was his.

Because defense counsel received the very answer seemingly solicited, we are hard-pressed to conclude that a *Bruton* violation exists. Furthermore, counsel for Jennifer McKee did not object to the question or to the answer.[17] Because a timely objection was not interposed, we review the district court's admission of this evidence for plain error. *United States v. Foree*, 43 F.3d 1572 (11th Cir.1995).

As we held in *Foree*, to satisfy the plain error standard, "a party must demonstrate: (I) that there was an error in the lower court's action, (ii) that such error was plain, clear, or obvious, and (iii) that the error affected substantial rights, i.e. that it was prejudicial and not 'harmless.'" *Foree*, 43 F.3d at 1578 (citing *United States v. Olano*, 507 U.S. 725, 732-37, 113 S.Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993)). The defendant bears the burden of proving prejudice. *Id.* Finally, "even if all three of these prerequisites are fulfilled, the Courts of Appeals should correct such errors only when they 'seriously affect the

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[17]We recognize that Jennifer McKee joined in Faulk's and Williamson's objections to the Government's introduction of Brian McKee's statement. However, the material covered in this question and answer had not been presented by the Government.

fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)).

We conclude that none of the *Foree* plain error prongs have been satisfied. Simply put, the statement concerning Jennifer McKee was the product of defense cross-examination, the answer provided be Special Agent Baker was specifically tailored to the question asked, and the district court did not err in failing to intervene as counsel failed to object or in any way bring the alleged error to the attention of the district court. Thus, it is readily observable that any error, even if we were to presume its existence, was not plain, clear, or obvious. Finally, we conclude that Jennifer McKee failed to prove that the error was not harmless. First, the two limiting instructions given by the district court dissipated any prejudice to Jennifer McKee. Secondly, Jennifer McKee's testimony, with nothing more, clearly supports the jury's conclusion as to her guilt. Therefore, when the prejudicial effect of the admission of the statement is compared to the properly admitted evidence of Jennifer McKee's guilt, it appears clear that there is no reasonable probability that the improper statement contributed to the conviction. *Schneble v. Florida*, 405 U.S. 427, 432, 92 S.Ct. 1056, 1060, 31 L.Ed.2d 340 (1972).

III. CONCLUSION

After a thorough review of the record and consideration of the parties' briefs and oral argument, we conclude that there is sufficient evidence to sustain the convictions of Faulk, Williamson, and Brian and Jennifer McKee. Furthermore, we conclude that the district court did not err in admitting Brian McKee's statements. Rather, we commend the district court for taking the time to conduct an extensive *Bruton* hearing and for tailoring the admission of Brian McKee's statements so as to ensure a fair trial for all

Defendants.[18]

AFFIRMED.

DOWD, District Judge, concurring in part and dissenting in part:

Initially, I concur in the affirmance of the convictions and sentences of the appellants Dwight Faulk, Linda Williamson and Jennifer McKee. I respectfully dissent as to the affirmance with respect to appellant Brian McKee.

The centerpiece of the Government's case against Brian McKee was the recitation of his oral admission as offered by FBI Special Agent Keith Baker. Simply put, Agent Baker stated that Brian McKee told him "that he knew what he was doing was illegal" in the following testimony:

Q. Sir, did you have an opportunity to conduct

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[18]The dissent would find a violation of due process as to Brian McKee. We respectfully disagree. This very experienced district judge stated in his order of January 4, 2002, that he had considered the recommendation of the United States Magistrate Judge and the objections filed by the defendant Brian McKee. He also stated that he made an independent review of the file and then made his rulings. We believe that he did exactly what he says he did. In our opinion, this is in accord with *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). We do not believe that there is any meaningful difference between the words "*de novo* determination" and "an independent review of the file." The ultimate decision was made by the district judge after reviewing the entire file. This meets the due process requirements according to *Raddatz*.

an interview of Brian McKee?

A. Yes, I did.

Q. Did Mr. McKee tell you that his address is 400 Bachelor Chapel Road, Gadsden, Alabama?

A. He did.

Q. Did he tell you that Big Wheel Recycling was formed in 1995 and it is a corporation?

A. What year did you say, sir?

Q. Formed in 1995.

A. That's correct.

Q. Did McKee tell you that he brought forward the resolution to allow recyclers to get a discounted rate at the Etowah Solid Waste Disposal Authority?

A. Yes, he did.

Q. Did McKee claim that he was being paid because of his having gotten the recycling resolution passed and for giving Big Wheel the discounted rate of $8.75 a ton for dumping debris at the Etowah Solid Waste Disposal Authority?

A. Yes, he did.

Q. When he was asked if the board members knew of the $8.75 a ton rate, did he tell you

that he was never questioned about it by any of them?

A. He did.

Q. Did he tell you that he left the $17.50 per ton rate on the weight scale bills so the manufactured housing companies would not know about the $8.75 a ton rate?

A. He did.

Q. Did he tell you that CEI also got the $8.75 a ton rate, and they were not entitled to it?

A. That is correct.

Q. Did he tell you that Sue Rogers did not know about the Big Wheel Recycling--did not know about Big Wheel Recycling when the 50 percent discount resolution was passed?

A. That is correct.

Q. Did Mr. McKee tell you that he knew what he was doing was illegal? A. Yes, he did.[1]

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[1]The other appellants, Faulk, Williamson, and Jennifer McKee, all opposed the admission of Baker's testimony that Brian McKee had told Baker that McKee knew what he was doing was illegal as a violation of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). I concur with my brethren that the admission of Brian McKee's testimony did not violate *Bruton*. My review of the record indicates that the Government only used the admission of "illegality" against Brian McKee. Moreover, the district court properly limited the

Tr., Vol. 20 of 29 at 154-55.

In advance of trial, on August 3, 2001, Brian McKee filed a motion to suppress his statements "of any nature obtained . . . by any and all investigative officers." In addition to raising a *Miranda* claim,[2] Brian McKee alleged that the statements "were involuntary" for several reasons: (1) because statements made by the investigating officers to the defendant were intentionally false and misleading; (2) because the defendant was exhausted due to the late hour and the fact that the interrogation was so long in duration, causing him to suffer from shock and emotional trauma based on his concern for his wife; (3) because of the attitude of the investigating officers toward the defendant; (4) because of promises made by the investigating officers to the defendant; and (5) because the defendant was coerced by the investigating officers into making these statements.

A second motion was also filed on August 3, 2001 and stated in part as follows:

> 5. The statements were involuntary because of statements made to the defendant by the investigating officers were intentionally false and misleading regarding their intentions concerning the interview.
>
> 6. That all statements and interviews

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jury's consideration of the admission to the Government's case against Brian McKee.

[2]*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

> were made because of promises made by the investigating officers to the defendant regarding their intentions to bring charges against this defendant and the wife of this defendant. *That the statements were involuntary in that the Government did not live up to their promises and therefore coerced the defendant into making these statements in hopes of gaining the reward which he was promised.* R.E. at 6 (emphasis added).

The Government filed a response on August 24, 2001 and replied to McKee's contention that the teachings of *Miranda* had been violated by demonstrating that McKee was never in custody during any of the three questioning sessions conducted on February 17, 2000, February 25, 2000, and March 14, 2001. Additionally, the Government pointed out that Brian McKee was accompanied by counsel for the interviews of February 25, 2000 and March 14, 2001. However, the Government's response ignored the allegations of a coerced statement.

The evidentiary hearing in response to Brian McKee's motion to suppress his statements was conducted on November 19, 2001 before a magistrate judge. McKee testified that he had been promised that if he cooperated with the investigation, his wife would not be prosecuted. The Government did not present any testimony to rebut the McKee claim of an involuntary admission.

Magistrate Judge Walker's Report and Recommendation filed on December 14, 2001 addressed the issue of voluntariness as raised by Brian McKee and recommended a denial of his motion to suppress.

On December 27, 2001, Brian McKee's counsel filed very thorough objections[3] to the Report and Recommendation of Magistrate Judge Walker.

On January 4, 2002, the district court, after stating that "he engaged in an independent review of the file," denied the objections of Brian McKee entered on December 27, 2001.

The watershed case of *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), settled the dispute as to whether a judge should submit the issue of voluntariness of a confession to the jury with instructions to ignore the confession if the jury found the confession to be involuntary. The Court held that the issue of voluntariness was to be decided in a pre-trial setting by the judge. If the confession was deemed involuntary, it was not to be submitted to the jury.

In this case, Brian McKee offered testimony on the issue of voluntariness. His testimony was not rebutted. In her recommendation, Magistrate Judge Walker opined that McKee's testimony was not credible and thus excused the lack of rebuttal by the Government.

The ruling in *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980), with respect to the use of

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[3]The Report and Recommendation was filed on Friday, December 14, 2001. McKee's counsel is located in Gadsden, Alabama. He filed the objections on December 27. No claim was advanced that the objections were filed untimely. The record is inconclusive as to whether Brian McKee's counsel received the Report and Recommendation on December 14. Consequently, for the purpose of this dissent, I conclude that the objections of December 27 were timely filed.

magistrate judges to conduct suppression hearings in criminal cases in United States District Court proceedings, merits discussion. By a 5-4 vote, the Supreme Court determined that the district court did not have to hear anew the conflicting testimony heard by the assigned magistrate judge who conducted the suppression hearing.[4] The defendant testified that he had made incriminating statements at a meeting with Government agents only after "obtaining confirmation" from the agents of their earlier promise that the indictment against him would be dismissed if he cooperated. The agents testified at the suppression hearing and denied making the promise. Confronted with an issue of credibility, the magistrate judge filed a report which recommended that the defendant's motion be denied after stating: "I find the testimony of the Alcohol, Tobacco and Firearm Agents more credible . . . ; I find that Federal agents never advised [respondent] that charges against him would be dismissed, if he cooperated." The Seventh Circuit had ruled that Raddatz had been deprived of due process by the procedure used and by the failure of the district court to rehear the testimony before accepting the recommendation of the magistrate judge. Nonetheless, the Supreme Court ruled that the due process rights of the defendant were protected by the Federal Magistrates Act because the district court acts as the ultimate decision maker on the defendant's suppression motion with broad discretion to accept, reject or modify the magistrate judge's proposed findings which include the discretion to hear the witnesses to resolve conflicting credibility claims. The majority held that the *de novo* determination of contested credibility assessments without personally rehearing the live testimony did not violate due process.

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[4]In so ruling, the Supreme Court reversed the contrary decision in *United States v. Raddatz*, 592 F.2d 976 (7th Cir.1979).

In the *Raddatz* decision, the majority opinion written by Chief Justice Burger described the actions of the district court after it received the magistrate's report as follows:

> Respondent filed objections to the Magistrate's report. In rendering its decision, the District Court stated that it considered the transcript of the hearing before the Magistrate on the motion to suppress, the parties' proposed findings of fact, conclusions of law, and supporting memoranda, and that it read the recommendation of the Magistrate and heard oral argument of counsel. Finding "that the three statements given by the defendant and sought to be suppressed were made voluntarily," the District Court accepted the recommendation of the Magistrate and denied the motion to suppress.

447 U.S. at 672, 100 S.Ct. 2406.

In the case at hand, the district court stated, in response to the objections to the magistrate's report as it applied to the defendant Brian McKee's objections to the denial of the motion to suppress, simply that he made "an independent review of the file" and, based on that review, denied the motion. Contrary to *Raddatz*, there is no suggestion that the district court had considered the transcript of the testimony; there is no suggestion of a "*de novo* determination" of those portions of the magistrate's report, findings or recommendations to which the objections had been made, as required by 28 U.S.C. § 636(b)(1)(C). Furthermore, the absence of any suggestion of a *de novo* determination comes in a situation where, as pointed out by the magistrate and contrary to the conflicting testimony of the setting in *Raddatz*, the Government did not even bother to offer rebutting testimony to the testimony of Brian McKee.

Under the circumstances as above outlined, and accepting the teachings of *Raddatz*, it is my view that the due process rights of Brian McKee were violated in this case.[5] To hold otherwise would be the equivalent of improperly delegating Article III powers.[6]

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[5]I find support in *Martinez v. Estelle*, 612 F.2d 173, 180 (5th Cir.1980), in which the Fifth Circuit found, after citing *Jackson v. Denno*, that "the record before us does not establish with 'unmistakable clarity' that the trial judge reliably determined the voluntariness of the confession. *Jackson v. Denno* has not been satisfied." *See also Jeffrey S. v. State Board of Education of State of Georgia*, 896 F.2d 507, 513 (11th Cir.1990) (criticizing failure to conduct the requisite *de novo* review where the district court "relied heavily upon the magistrate's assessment of the evidence and his judgment in drawing reasonable inferences therefrom."); *Stokes v. Singletary*, 952 F.2d 1567, 1576 (11th Cir.1992) (criticizing district court's failure "to accord a *de novo* review of the magistrate's factual findings"). The majority here seems to be setting up a new standard of review based on the length of experience of the district judge.

[6]Although 28 U.S.C. § 636(b)(1)(B) permits a district judge to refer a motion to suppress to a magistrate judge for recommendations regarding disposition, § 636(b)(1)(C) "meticulously sets forth a *de novo* review procedure." *Gomez v. United States*, 490 U.S. 858, 874, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989) (holding that allowing a magistrate judge to conduct the *voir dire* for jury selection in a felony case was not harmless error, especially because it was "without any meaningful review by a district judge"). I doubt that the *Gomez* Court would find "meaningful" the cursory and unexplained "review of the file" conducted by the district court in the instant case.

Consequently, I would reverse the conviction of Brian McKee, vacate his sentence, and remand for a new trial.

FILED
U.S. COURT OF APPEALS
OCT 03 2003
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 02-12765-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LINDA WILLIAMSON,
a.k.a. Linda West,
DWIGHT FAULK,
JENNIFER MCKEE,
BRIAN MCKEE,

Defendants-Appellants.

On Appeal from the United States District Court for the
Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S)
FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: DUBINA and FAY, Circuit Judges and DOWD*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

*Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 21 2003
THOMAS K. KAHN

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12765-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LINDA WILLIAMSON,
a.k.a. Linda West,
DWIGHT FAULK,
JENNIFER MCKEE,
BRIAN MCKEE,

Defendants-Appellants.

On Appeal from the United States District Court for the
Middle District of Alabama

ORDER:

( ) The motion of Appellant, Brian McKee, for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellant, Brian McKee, for (X) stay ( ) recall and stay of the issuance of the mandate pending

petition for writ of certiorari is GRANTED to and including *January 2, 2004*, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/
UNITED STATES CIRCUIT JUDGE

AO 245B (Rev. 3/01) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
MIDDLE District of ALABAMA

FILED
MAY 7 2002
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

UNITED STATES OF AMERICA

v.

BRIAN MCKEE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
2:01CR00106-002

John D. Floyd
Defendant's Attorney

THE DEFENDANT:

□ pleaded guilty to count(s) _____

□ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1-31 of the Indictment on 01/22/2002 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:371	Conspiracy to Commit Mail Fraud	02/01/2000	1
18:1341	Mail Fraud; Aiding and Abetting	02/01/2000	2-18

18:1956(h)	Conspiracy to Commit Money Laundering	02/01/2000	19
18:1956(a)(1)(A)(I) and 2	Money Laundering; Aiding and Abetting	02/01/2000	20-31

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

□ The defendant has been found not guilty on count(s) _____
□ Count(s) ___ □ is □ are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 422-92-1395

Defendant's Date of Birth: 04/26/1959

Defendant's USM No.: 10901-002

05/03/2002
Date of Imposition of Judgment

/s/
Signature of Judicial Officer

Defendant's Residence Address:
400 Bachelor Chapel Road
Gadsden Alabama 35903

Defendant's Mailing Address:

MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE
Name and Title of

Same as Above _____ Judicial Officer

5/7/2002 _____
Date

DEFENDANT: BRIAN MCKEE
CASE NUMBER: 2:01CR00106-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total total term of 94 Months. This term consists of 60 months on counts 1 through 18 and 94 months on counts 19 through 31, all such terms to be served **concurrently**.

□ The court makes the following recommendations to the Bureau of Prisons:

□ The defendant is remanded to the custody of the United States Marshal.

□ The defendant shall surrender to the United States Marshal for this district:

□ at _____ □ a.m. □ p.m. on _____

□ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

x before 2 p.m. on 06/17/2002

□as notified by the United States Marshal.

□as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: BRIAN MCKEE
CASE NUMBER: 2:01CR00106-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term 3 Years. This term consists of 3 years on counts 1 through 18 and 3 years on counts 19 through 31, all such terms to run **concurrently**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

□ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least

ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: BRIAN MCKEE
CASE NUMBER: 2:01CR00106-002

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in drug testing and/or treatment as directed by the probation officer. He shall contribute to the cost of any treatment based on ability to pay and availability of third party payments.

2. The defendant shall provide the probation officer any requested financial information.

3. The defendant shall not obtain new credit without the approval of the probation officer unless in compliance with the payment schedule.

DEFENDANT: BRIAN MCKEE
CASE NUMBER: 2:01CR00106-002

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 3,100.00	$ 0	$ 1,009,109.46

□ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

X The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid in full prior to the United States receiving payment.

*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

Name of Payee
Etowah Solid Waste
Disposal Authority
Attn James E. Turnbach
Post Office Box 129
Gadsden, AL 35902

TOTALS $_____ $ 1,009,109.46

□ If applicable, restitution amount ordered pursuant to plea agreement $ _____

□ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

X The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

X the interest requirement is waived for the □ fine and/or □ restitution.

□ the interest requirement for the □ fine and/or □ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: BRIAN MCKEE
CASE NUMBER: 2:01CR00106-002

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A X Lump sum payment of $ 1,012,209.46 due immediately, balance due

□ not later than _____, or
□ in accordance with □ C, □ D or □ E below; or

B □ Payment to begin immediately (may be combined with □ C, □ D or □ E below); or

C □ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D □ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E □ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary penalty payments shall be made to the Clerk, United States District Court, Middle District of Alabama, Post Office Box 711, Montgomery, AL 36101, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. Any balance of the restitution remaining at the start of supervision shall be paid at the rate of $300.00 per month. No further restitution payment shall be required after the sum of the amounts actually paid by all defendants has fully covered the total amount of restitution ordered.

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

Dwight Faulk; 2:01CR00106-001; $1,009,109.46
Jennifer McKee; 2:01 CR00106-003; $85,859.00
Linda Williamson a/k/a Linda West; 2:01CR00106-004; $1,009,109.46

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:

The preliminary order of forfeiture issued by this Court on January 28, 2002, is hereby made FINAL. Property is forfeited as outlined in said order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.